SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 178

"S.S. MONROSA", HER ENGINES, TACKLE, ETC., AND NAVIGAZIONE ALTA ITALIA, PETITIONERS,

vs.

CARBON BLACK EXPORT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 16, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16667

CARBON BLACK EXPORT, INC., Appellant,

versus

SS MONROSA, Her Engines, Tackle, Etc., and NAVIGAZIONE ALTA ITALIA, Appellees.

To the Hon. Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, New Orleans, Louisiana:

JOINT REQUEST FOR PRINTING RECORD—Filed: May 8, 1957

We hereby request that the record on appeal in the above entitled case shall include the following:

1. Libel of Carbon Black Export, Inc.
2. Stipulation to Abide Decree in amount of $100,000.00.
3. Motion to Decline Jurisdiction.
4. Photostat of bill of lading of Creole Line.

[fol. 2] 5. Affidavit of Carl G. Stearns in opposition to Motion to Decline Jurisdiction.

6. Affidavit of E. D. Vickery in Support of Motion to Decline Jurisdiction.

7. Memorandum Opinion of Judge Allen B. Hannay.

8. Agreement Bond in the amount of $100,000.00.

9. Final Decree filed and entered on January 25, 1957.

10. Libelant's Petition for Appeal and Order allowing appeal.

11. Notice of Appeal and Waiver.

12. Assignment of Errors.

Fulbright, Crooker, Freeman, Bates & Jaworski, (Signed) By Carl G. Stearns, Attorneys for Appellant.

Royston & Rayzor, (Signed) By: E. D. Vickery, Attorneys for Appellee.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOLDING SESSIONS AT HOUSTON

No. 1417 ADM

CARBON BLACK EXPORT, INC.,

versus

SS "MONROSA", Her Engines, Tackle, Etc. and NAVIGAZIONE ALTA ITALIA

• • • • • • •

[fol. 4] ORIGINAL LIBEL—Filed: April 3, 1956

To the Honorable the Judges of the United States District Court for the Southern District of Texas, Houston Division:

The original libel of Carbon Black Export, Inc.,

-against-

SS MONROSA, her engines, tackle, etc., and Navigazione Alta Italia, in a cause of contract and for loss and damage to cargo, civil and maritime, alleges, upon information and belief, as follows:

First: At all the times hereinafter mentioned, the libelant, Carbon Black Export, Inc., was and now is a corpora-

tion duly organized and existing under the laws of a state of the United States.

[fol. 5] Second: At all the times hereinafter mentioned, the Steamship MONROSA was and now is a general ship employed in the carriage of merchandise by water for hire and now is or will be during the pendency of this suit within this District and within the jurisdiction of this Honorable Court.

Third: At all the times hereinafter mentioned, the respondent, Navigazione Alta Italia, was and now is a corporation organized and existing under the laws of Italy, having its principal office and place of business at Genoa, Italy, and at all times material herein was the owner and operator of the Steamship MONROSA.

Fourth: On or about December 15, 1955, the libelant, Carbon Black Export, Inc., delivered to and shipped on board the Steamship MONROSA, then lying in the Port of Houston, Texas, the following shipments of bags and cartons of carbon black, then being in good order and condition:

[fol. 6]

Bill of Lading No.	*Quantity*	*Consignee*	*Port of Discharge*
1	7 cartons	Maritima S.P.A.	Trieste, Italy
1	1980 bags	Pirelli S.P.A.	Naples, Italy
2	968 bags	Pirelli S.P.A.	Venice, Italy
3	440 bags	Pirelli S.P.A.	Venice, Italy
5	528 bags	Pirelli S.P.A.	Venice, Italy
5	(250 bags ((1 cargon (sic)	Shipper	Genoa, Italy
6	1100 bags	Pirelli S.P.A.	Venice, Italy
7	600 bags	Ditta Ch. Lorilleux & Co.	Venice, Italy
7	25 bags	Ditta G.E. Hess	Genoa, Italy
8	220 bags	Spett Pirelli S.A.	Venice, Italy
9	1544 bags	Pirelli S.P.A.	Venice, Italy
11	4400 bags	Shipper	Venice, Italy
14	10 cartons	Ditta G.E. Hess	Genoa, Italy
17	5 bags	F.I.L.M.S. Fabrica	
	12,060 bags & 18 cartons	Italiana Leghe Metall Iche Sinterizzate	Genoa, Italy

and the said respondent and the said Steamship MONROSA, by and through her agents and her master, then and there accepted such bags and cartons of carbon black so shipped and delivered to said Steamship MONROSA, and in consideration of certain agreed prepaid freight charges, agreed to transport the said bags and cartons of carbon black to the ports of Trieste, Naples, Venice and Genoa, Italy, as hereinabove set forth, and there deliver the same in like good order and condition as when shipped, de-
[fol. 7] livered to and received by said steamship and by the respondent; to the consignees hereinabove set forth, and in accordance with the valid terms of the above described and numbered bills of lading then and there signed and delivered to the libelant by the master and agents of said Steamship MONROSA, the duly authorized agents and representatives of said Steamship MONROSA and of the respondent.

Fifth: On or about December 23, 1955, the libelant, Carbon Black Export, Inc., delivered to and shipped on board the Steamship MONROSA, then lying in the Port of New Orleans, Louisiana, the following shipments of bags of carbon black, then being in good order and condition:

Bill of Lading No.	*Quantity*	*Consignee*	*Port of Discharge*
1	440	Pirelli S.P.A.	Venice, Italy
1	1760	Pirelli S.P.A.	Naples, Italy
2	2640	Pirelli S.P.A.	Venice, Italy
2	308	Pirelli S.P.A.	Naples, Italy
3	2860	Shipper	Naples, Italy
4	880	Pirelli S.P.A.	Venice, Italy
5	300	Ditta F. Fiorentino De Alberto Peretti	Ganoa, Italy
5	1452	Spett Pirelli S.A.	Venice, Italy
6	440	Pirelli S.P.A.	Venice, Italy
7	220	Pirelli S.P.A.	Venice, Italy
8	220	Pirelli S.P.A.	Venice, Italy
9	1320	Pirelli S.P.A.	Venice, Italy
10	4399	Pirelli S.P.A.	Venice, Italy
	17,239		

[fol. 8] and the said respondent and the said Steamship MONROSA, by and through her agents and her master, then and there accepted said bags of carbon black so shipped and delivered to said Steamship MONROSA, and in consideration of certain agreed prepaid freight charges, agreed to transport the said bags of carbon black to the ports of Venice, Naples and Genoa, Italy, as hereinabove set forth, and there deliver the same in like good order and condition as when shipped, delivered to and received by said steamship and by the respondent, to the consignees hereinabove set forth, and in accordance with the valid terms of the above described and numbered bills of lading then and there signed and delivered to the libelant by the master and agents of said Steamship MONROSA, the duly authorized agents and representatives of said Steamship MONROSA and of the respondent.

Sixth: The said Steamship MONROSA sailed from the port of Houston, Texas, on or about December 15, 1955, and sailed from the port of New Orleans, Louisiana, on or about December 23, 1955, having on board the aforesaid shipments of carbon black, and subsequently, and on or about January 20, 1956, arrived at the port of Genoa, Italy, where she discharged and delivered part of said shipments, but not in like good order and condition as when shipped, delivered to and received by her, but on the contrary seriously injured and impaired in value by reason of shortage, slackage, contamination by water and other substances and other damage, and wholly failed to deliver the balance of said shipments at the ports of Genoa, Trieste, Naples, and Venice, Italy, where consigned and destined to, all in violation of the respondent's obligations and duties and of [fol. 9] said vessel's obligations and duties as a carrier of merchandise by water for hire.

Seventh: Libelant was the shipper or owner of the shipments described in this libel, and brings this action on its own behalf and, as agent and trustee, on behalf of and for the interest of all parties who may be or become interested in the said shipments, as their respective interests may ultimately appear, and libelant is entitled to maintain this action.

Eighth: By reason of the premises the libelant has sustained damage, as nearly as the same can now be estimated, in the sum of $110,000.00, no part of which has been paid although duly demanded.

Ninth: Libelant has performed all of the conditions precedent on its part to be performed under the terms of the aforesaid bills of lading.

Tenth: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays:

1) that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction issue against the Steamship MONROSA, her engines, tackle, etc., and that all persons claiming any right, title or interest in the said steamship may be cited to appear and answer upon oath all and singular the matters aforesaid, and that [fol. 10] the said steamship may be condemned and sold to pay the demands as aforesaid with interest, costs, and disbursements;

2) and that this Honorable Court will decree the payment by the said Steamship MONROSA to the libelant of the damages sustained by it as aforesaid, with interest, costs, and disbursements;

3) and that process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against Navigazone (sic) Alta Italia, respondent herein, citing it to appear and answer on oath all and singular the matters aforesaid;

4) and that this Honorable Court may adjudge and decree that said respondent pay to libelant its damages as aforesaid with interest, costs and disbursements;

5) and that libelant may have such other and further relief as in justice it may be entitled to receive.

Hill, Rivkins, Middleton, Louis & Warburton, 96 Fulton Street, New York 38, New York.

Fulbright, Crooker, Freeman, Bates & Jaworski, Second National Bank Building, Houston 2, Texas, [fol. 11] (Signed) By: Carl G. Stearns, Proctors for Libelant.

* * * * * * *

Duly sworn to by Carl G. Stearns, jurat omitted in printing.

[fol. 12]

IN UNITED STATES DISTRICT COURT

STIPULATION TO ABIDE DECREE—Filed: April 9, 1956

Whereas a libel was filed in this cause on or about April 3, 1956, by Carbon Black Export, Inc., against the SS MONROSA, her engines, tackle, etc., and Navigazione Alta Italia, for the reasons and causes in said libel mentioned, and a claim has been filed by Navigazione Alta Italia, a corporation, to said vessel, and the said claimant, Navigazione Alta Italia, and National Surety Corporation its surety, the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of said claimant or its surety, execution may issue against their goods, chattels and lands for the sum of One Hundred Thousand ($100,000.00) Dollars.

Now, Therefore, It Is Hereby Stipulated and Agreed, for the benefit of whom it may concern, that the stipulators undersigned are, and each of them is, bound in the sum of One Hundred Thousand ($100,000.00) Dollars, conditioned that the claimant above named shall abide by and pay the money awarded, including costs of court, by the final decree rendered in the cause by this Court, or in case of an appeal by the Appellate Court.

Navigazione Alta Italia, By Illegible, Principal, Its Proctors.

[fol. 13] National Surety Corporation, By Ben S. Moore, Surety.

(Seal)

Taken and acknowledged as to the claimant this 9 day of April, 1956.

(Signed) Mrs. Louise Hill, Notary Public in and for Harris County, Texas.

(Seal)

Taken and acknowledged as to the surety this 9 day of April, 1956.

(Signed) Mrs. Louise Hill, Notary Public in and for Harris County, Texas.

(Seal)

Approved:

Hill, Rivkins, Middleton, Louis & Warburton.

Fulbright, Crooker, Freeman, Bates & Jaworski,
(Signed) By Carl G. Stearns, Proctors for Libellant.

[fol. 14]

IN UNITED STATES DISTRICT COURT

RESPONDENT'S MOTION TO DECLINE JURISDICTION—
Filed: July 27, 1956

Comes now the Respondent, Navigazione Alta Italia, and moves the Court to decline jurisdiction of this cause, and as grounds therefor, would respectfully show:

1.

The libel, a cause of cargo damage, civil and maritime, alleges the issuance of a number of bills of lading by respondent, covering a cargo of carbon black loaded aboard the SS MONROSA at the Port of Houston, Texas for carriage to certain Italian ports, as more fully appears from the allegations contained in Article Fourth of said libel.

2.

All of the bills of lading referred to in Article Fourth of said libel contain the following clauses regarding jurisdiction of legal proceedings respecting any loss or damage

to cargo carried and regarding the law applicable to all such proceedings arising out of cargo damage or loss under the bills of lading, the contracts of carriage:

"Clause 27—Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or [fol. 15] places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there."

"Clause 28—Also, that this contract is governed by the law of the steamer, carrying the goods, but any average that may arise on the voyage to be adjusted according to conditions named on the reverse side."

"Clause 29—Also, that in regard to all and everything which is not regulated and provided for in the present contract of transport, the regulation of the Italian Commercial Code will be in vigour."

"Clause 32—This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such terms shall be void to that extent, but no further."

3.

The Libellant has assented to this, a reasonable jurisdictional agreement by virtue of his entry into the contracts of carriage, the bills of lading.

[fol. 16]

4.

Respondent would show that the jurisdictional agreement herein is reasonable for the following reasons:

1. The vessel is owned by a Genoese corporation.

2. The vessel's witnesses are Italians, residing in Italy with no expectation of being in the United States at time of trial.

3. The cargo was discharged in Italy, and in part in the Port of Genoa, Italy, and was there surveyed and the damages segregated and the condition of the cargo noted.

4. Clause 8 of the Bill of Lading provides that in the event of claims for short delivery and damage, the value of the cargo shall be determined as of its market price at the port of destination, on the day of the vessel's arrival in the Italian port; accordingly, testimony as to market value will have to be obtained in Italy.

5. The seaworthiness of the vessel before, at the beginning of, and during the course of the voyage will be one of the main issues in this case and all repairs and surveys of the vessel, both before the voyage in question, and following its completion were performed in Italy, and accordingly, all evidence regarding inspection, repairs and seaworthiness in general will be more readily available to the Italian Court.

[fol. 17] 6. General average has been declared in Italy and all computations required and adjudication thereof is being accomplished in Italy.

7. If United States shippers elect to move their goods on foreign vessels, thereby obtaining favorable rates and routings, it is reasonable that their assent to foreign jurisdictions for suits arising from damage to the cargo should be given its contractual effect.

5.

Respondent further urges the Court to decline jurisdiction under the doctrine of forum non conveniens and as grounds therefor, would respectfully refer to the reasons and causes in paragraph 4 supra, and the assent given by Libellant to litigate in Genoa as part of the contract of carriage.

Wherefore, Premises Considered, Respondent, Navigazione Alta Italia, moves the Court to decline jurisdiction and grant Respondent its costs in its behalf expended.

Respectfully submitted, Royston & Rayzor, (Signed) By E. D. Vickery, MLC, 877 San Jacinto Building, Houston, Texas, Proctors for Respondents.

[fol. 18] *Duly sworn to by M. L. Cook, jurat omitted in printing.*

[fol. 19]

NOTICE OF MOTION

To: Messrs. Hill, Rivkins, Middleton, Louis & Warburton, and, Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas, Proctors for Libellant.

Please take notice that the above Motion will be presented to the Court and an immediate ruling requested thereon on September 10, 1956, or as soon thereafter as the same may be heard.

Royston & Rayzor, (Signed) By Illegible, Proctors for Respondents.

Certificate of Service (omitted in printing).

[fol. 20]

BILL OF LADING COVERING 25 BAGS OF CARBON BLACK—Dated: Dec. 15, 1955

(This Bill of Lading was attached to Memorandum in Support of Respondent's Motion to Decline Jurisdiction.)

Bill of Lading issued under agreement with Liverpool Bill of Lading Conference (1907) Committee

B/L No. .....

CREOLE LINE

(NAVIGAZIONE ALTA ITALIA)

GENOA, ITALY

J. R. MICHELS, JR.

U. S. GULF & SOUTH ATLANTIC TO GENOA, LEGHORN, NAPLES & OTHER MEDITERRANEAN PORTS

SHIPPED BY (or received for shipment from) CARBON BLACK EXPORT, INC. in apparent good order and condition on board the Italian Steamship MONROSA or other Steamer, owned, controlled or operated by Nav. Alta Italia from HOUSTON, TEXAS to the Port of GENOA, ITALY with liberty either before or after proceeding towards the port of discharge to proceed to, and/or stay at, any ports or places whatsoever although in a contrary direction to, or out of, or beyond, the route to the said port of discharge, once or oftener, in any order, backwards or forwards, for the purpose of dry docking (even with cargo on board), or loading or discharging cargo or passengers, or for any purpose whatsoever. Nothing in this bill of Lading, whether written or printed or implied therefrom, shall limit or affect the provisions of this clause.

PARTICULARS FURNISHED BY SHIPPER OF GOODS

MARKS AND NUMBERS	ARTICLES	SAID TO WEIGH
Net Wt. 50 lbs. Code 110 Genoa Hess Kosmos Monogram Kosmos 2 Made in USA UCCO	25 Twenty five (25)—50# Multiwall Bags "Kosmos 2" Carbon Black Net Wt. 1250 lbs. These Commodities Licensed by U.S. for Ultimate Destination Italy Diversion Contrary to U.S. Law Prohibited.	1291 lbs.

CH 6576
Exp. Lic. C5-718-60061
Each Bag Measures: 1.95 CF
Ex Car: LN 5915

"OCEAN FREIGHT PREPAID"

COPY
NOT NEGOTIABLE
Subject to York-Antwerp Rules 1950

Substitution of another vessel of different ownership is only permissible in case the named vessel is lost, or in case of accident, or other unforeseen event of force majeure.

UNDER DECK, (weight, measurement, quality, quantity, gauge, contents and value unknown and shipowners not accountable for same), and to be delivered in like good order and condition at the Port of GENOA, ITALY or so near thereto as she may safely get and always lie afloat, unto the ORDER OF: DITTA G.E. HESS 1 VIA MONTE-CUCCOLI TURIN 103 ITALY or his or their assigns, he or they paying freight, unless prepaid, and charges in cash, on arrival at Port of Discharge, in exchange for delivery order, without any allowance of credit or discount on the said goods on actual Gross weight shipped or on delivered weight, ship's option, as specified below.

PARTY TO NOTIFY: SAME AS ABOVE

FREIGHT AND CHARGES

48.75 C. F.	at 40¢	per C. F.	$ 19.50
		TOTAL	$ 19.50

The word "steamship" or "steamer" as used in this form of bill of lading is understood to include and to stand for "motorship" as the case may require.

Notwithstanding anything to the contrary that may be printed herein all Freight and Charges, or short paid freight, if any collectible under this Bill of Lading in Italy, are to be converted into Lire at the quoted rate for Sight Bills Genoa on New York on the date of the vessel's entry at the Custom House at Port of Discharge.

The vessel is entitled to discharge at the usual discharging berth of the line and/or at any wharf and/or into lighters.

The rate of freight is adjusted upon the basis of the following exceptions and agreements:

In case the cargo or any portion thereof shall be shut out of the vessel, the master or agent shall have liberty to forward by another steamer or steamers (at the risk of the owners of said cargo). Notice of such forwarding shall be sent to the shipper when practicable and any difference in freight resulting therefrom shall be paid or received by

the shipowner. Merchandise on wharf awaiting shipment or delivery is at shipper's risk.

The said ship or any other vessel employed in any part of the transport shall be at liberty to delay, or anticipate her advertised sailing date either before or after proceeding towards the port of destination, to proceed to and call at any ports or places whatsoever (although in a contrary direction to or out of or beyond the accustomed route to the port of destination), to return to her loading port or ports, once or oftener in any order and for any purpose whatsoever, and in all cases such ports, places and sailings shall be deemed to be included within the intended voyage; also to sail, with or without pilots; to have liberty to swing or manoeuver, to adjust compasses or to remove from one berth to another, or be drydocked with cargo on board whether prior to the commencement of, after the termination or at any stage of the voyage; to carry goods on deck; to carry goods of all kinds, dangerous or otherwise; to deviate in any manner and for any purpose whatsoever, any warranty or rule of law to the contrary notwithstanding; to transship or land and reship by lighter or otherwise at port of shipment or at any other port or ports into any other ship or conveyance; to tow or to be towed, and to assist vessels in all situations. All the liabilities, conditions and exceptions of this Bill of Lading shall apply to any carrying vessel (any custom or rule of law notwithstanding) although the vessel may have deviated from the contract voyage or customary or intended route of voyage and although such deviation may amount to change or abandonment of the voyage and notwithstanding unseaworthiness or unfitness of the vessel at the commencement of or at any period of the voyage. The carrier shall have the liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods and in case the steamer shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to transship the goods to their destination by any other steamer, rail line, or lighter at shipper's risk; the carrier shall not be liable for loss or damage occasioned by perils of the sea or other waters, by fire from any cause whatsoever occurring, barratry of the master or crew; by

enemies, pirates, robbers or thieves, by arrest and restraint of princes, rulers of people, riots, strikes, lockout or stoppage of labor from any cause whatsoever, by explosion, bursting of boilers, breakage of shafts or any other latent defect in hull, machinery or appurtenances, or unseaworthiness of the steamer whether existing at time of shipment or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy; by heating, frost, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, vermin, or by explosion of any of the goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature of the goods, or the insufficiency of packages, nor for land damages; nor for obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk or transshipment; nor for any loss or damage caused by the prolongation of the voyage; nor for any damage to any goods, however caused which is capable of being covered by insurance, and the carrier shall not be concluded as to correctness of statements herein of quality, gauge, contents, weight and value. In case of general average, whatever be the destination of the goods on board, settlement shall be effected amicably at Genoa at the request of the Shipowners according to the York-Antwerp Rules 1950, and, for any matter not contemplated in these rules according to the usages of the Port of Genoa. Lacking these, recourse shall be had to the rules of the Italian Commercial Code.

Receivers must accept and sign the Average Bond appointing one or two Average Adjusters, chosen by the Shipowners from amongst the Adjusters recognized and authorized by the Tribunal or by the Chamber of Commerce of Genoa.

Receivers must disburse to the Shipowners or their agents on signature of the Average bond, the sum which will be requested as a temporary deposit due by the goods, binding themselves also by the said Average Bond to recognize and pay the final contribution apportioned as payable on Adjustment of the Average. Consignment of the goods to the Receiver shall not be effected until the execution of the disposition herein contained.

It is mutually agreed that the ship is warranted seaworthy solely in the sense that the Ship owners will have used every diligence in rendering her such; and in proof that such diligence has been used, it will be sufficient to show the Certificate of the Classification Registry in effect at the time.

In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which, the carrier is not responsible, by statute, contract or otherwise, the goods, shippers, consignees or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the said ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery.

This shipment is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act relating to the navigation of vessels," etc., and in the absence of fraud, clerical or obvious error, this Bill of Lading, signed by the Master or Agent, shall be conclusive evidence against the Shipowner that the above mentioned cargo has been received, if the number of packages agree with the mate's and/or tally clerk's receipt.

Todos los impuestos, lanchages, derechos y gastos de descarga limpia de Puerto y cuarentena son de cuenta y a cargo del receptor aun cuando se cobren o liquiden al vapor.

AND FINALLY, in accepting this Bill of Lading, the Shipper, Owner and Consignee of the goods and the holder of the Bill of Lading, agreed to be bound by all of its stipu-

lations, exceptions and conditions, whether written, printed or stamped on the front or back hereof, as fully as if they were all signed by such Shipper, Owner, Consignee or holder, any local customs or privileges to the contrary notwithstanding.

IN WITNESS WHEREOF, the Master or Agent of said vessel hath affirmed to three Bills of Lading, all of this tenor and date, one of which being accomplished and given up to the carrier, the other to stand void.

FOR AND ON BEHALF OF
NAVIGAZIONE ALTA ITALIA

BY TEXAS TRANSPORT AND TERMINAL CO., INC.
AS AGENTS ONLY

BY J. R. TAYLOR

Dated in HOUSTON, TEXAS

DEC 15 1955

Continued over page

In addition to the liberties printed in the Bill of Lading, it is clearly stated that the steamer carrying this cargo is entitled to proceed and call at any port of the U. S. A. in the Gulf of Mexico and Southern Atlantic, and also to call at any Italian and Foreign port in the Mediterranean, to load and discharge goods and/or passengers or for any other purposes whatsoever.

ATTENTION OF SHIPPERS IS CALLED TO SECTION 235 OF THE UNITED STATES PENAL LAWS. Every package containing explosives or other dangerous articles when presented to a common carrier for shipment, SHALL HAVE PLAINLY MARKED ON THE OUTSIDE THEREOF THE CONTENTS THEREOF; and it shall be unlawful for any person to deliver or cause to be delivered to any common carrier engaged in interstate or foreign commerce by land or water, for interstate or foreign transportation, or to carry upon any vessel or vehicle engaged in interstate or foreign transportation any explosive or other dangerous article under any false or deceptive

marking, description, invoice, shipping order or other declaration, or without informing the agent of such carrier of the true character thereof at or before the time such delivery for carriage is made. "Whosoever shall knowingly violate or cause to be violated any provisions of this section or of the three sections last preceding or any regulation made by the Interstate Commerce Commission in pursuance thereof, shall be fined not more than $2,000 or imprisoned not more than eighteen months or both." And it is hereby understood and agreed that the shipper shall be responsible to the carrier for all damages directly or indirectly arising out of the shipment of the above named or any other goods of a dangerous or damaging nature, unless notice is given as above provided.

1.—IT IS AGREED that the shipowner has offered the shipper a choice of rates computed in consideration of all the terms of this contract and the value of the cargo, the lowest rate quoted for the carriage of goods applying if the shipment is made under the conventional valuation specified in this paragraph, and a higher ad valorem rate applying if a higher value is declared by the shipper. Unless such higher value shall be declared by the shipper and written in this bill of lading and freight paid on the basis of such value, the shipper represents and agrees that the value of the goods is the invoice value unless in shipments in packages such value exceeds $250 per package or shipping unit. In such case the goods are valued at $250 per package or other shipping unit, at which limit of value the shipper elects to ship for the purpose of securing the lower rate. Unless a higher value is declared as aforesaid, such conventional valuation, or the actual value of the goods if less than such conventional valuation, shall constitute the measure of damage in any claim that may arise against the shipowner as carrier, bailee, or otherwise, and in any liability for partial loss or damage shall be adjusted pro rata.

2.—ALSO, that the steamer, lighter or carrier shall not be liable for articles specified in Section 4281 of the Revised Statutes of the United States unless written notice of the true character and value thereof is given at the time of loading and entered in the Bill of Lading.

3.—ALSO, that the shippers shall be liable for any loss or damage to steamer, cargo, lighter or wharf, caused by inflammable, explosive or dangerous goods shipped without full disclosure of their nature, whether such shipper be Principal or Agent, and such goods may be thrown overboard or destroyed at any time without compensation. Extra charges, if any, for discharging lighterage or other expenses on hazardous goods, declared or considered as such by civil or military authorities, must be borne by shippers and/or consignees.

4.—ALSO, that the carrier shall have a lien on the goods for all freights, primages and charges, and also for all fines or damages which the steamer, lighter or cargo may incur or suffer by reason of the incorrect or insufficient marking, numbering or addressing of packages or description of the contents. Bills of Lading must be made out in accordance with the prescription and regulations of port, customs or Consular authorities. Consular, Board of Health or other certificates required to accompany the goods are to be procured by shippers, and any detention, charges or penalties occurring to steamer or cargo, owing to the want of such certificate, are to be borne by the shippers and/or consignees.

5.—ALSO, the vessel to be entitled to commence discharging immediately upon arrival and discharge continuously or intermittently at any time during day and/or night, including Sundays and holidays, any custom of the port to the contrary notwithstanding. The vessel to have the option of discharging and making delivery of the goods, any custom of the port to the contrary notwithstanding, either to lighters or similar craft of any description, or to Custom House, warehouse, wharf, dock or quay, at owners of the goods risk, the carriers' liability in all cases ceasing as soon as the goods are free from the ship's tackles. The carriers to have the liberty to store the goods in warehouse, lazaretto, hulk or craft of any description, at the sole risk and expense of the owners thereof. All expenses exship's tackles, including delivery at current rates from thence, quay dues and expenses, lighterage, canal dues, storage, weighing, measuring, etc., are for account of the goods.

The steamer's responsibility to cease immediately the goods are discharged from the steamer's deck, when the goods shall be deemed delivered, but the steamer shall have always a lien on the goods for freight and charges of whatsoever nature, and the goods will not be consigned until after such payment.

6.—ALSO, that full freight is payable on damaged or unsound goods, but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage. Freight and charges shall become due and payable pro rata for any portion of this shipment on its arrival at destination.

7.—ALSO, that if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

8.—ALSO, that in the event of claims for short delivery when the steamer reaches her destination, the prices shall be the market price at the port of destination on the day of the steamer's entry at the Custom House less all charges saved. All claims for short delivery, loss, damage, or of whatever nature, also return of prepaid freight on quantity short shipped, must be made in writing to the steamer's agent at the port of destination of the goods, within 5 days after the steamer or lighter has finished discharging and ALWAYS BEFORE the goods are taken delivery of by the consignees, and in case such claims shall not be presented in writing within the time and the place hereinbefore designated such loss or damage shall be deemed to be waived and the steamer discharged therefrom. Compensation or claims for missing goods will not be allowed or entertained beyond the amount stated in the original invoice, which must be produced in substantiation.

9.—ALSO, that merchandise on wharf or lighter, or other craft, awaiting shipment or delivery be at shipper's risk of loss or damage not happening through the fault, or negligence of the owner, master, agent or manager of the steamer, any custom of the port to the contrary notwithstanding.

10.—ALSO, that this Bill of Lading, duly endorsed, be given up to the steamer's agent in exchange for delivery order.

11.—ALSO, that the freight prepaid will not be returned, goods lost or not lost.

12.—ALSO, that parcels for different consignees, collected or made up in single packages addressed to one consignee pay full freight on each parcel.

13.—ALSO, that all goods destined for points beyond the steamer's ports of call are subject to all conditions, stipulations and exceptions expressed in the customary form of Bill of Lading, in use at the time of shipment by carrier or carriers completing the transit; neither the vessel, her owner, nor agent shall be deemed to be the agent of such carrier or carriers. ALSO, that the goods to be forwarded at steamer's expense but at shipper's risk. If, upon arrival at port of transshipment, there shall be no carrier ready to receive the goods, said goods may be discharged into lighters or stored under suitable, available protection, at the risk and expense of the goods. Neither the vessel, her owner, nor Agent shall be liable for loss, damage, or delay occurring after the discharge of said goods.

14.—ALSO, if the goods are consigned to a point where the vessel does not discharge, the shipper constitutes the shipowner his agent to forward the goods to or toward their ultimate destination and all liability whatsoever of the shipowner as carrier, bailee or otherwise shall cease upon the goods leaving the actual custody of the shipowner. Such forwarding carriage shall be subject to the terms of the usual bill of lading, receipt, contract or shipping document of the on-carrier whether issued or not, including, but without limiting the generality of the foregoing, any valuation of the goods, or limitation of liability, or exemption from liability, or the requirement for notice of claim or commencement of suit, even though such terms be less favorable to the shipper than the terms of this bill of lading, whether known to the shipper or not, even though exempting the on-carrier from liability for negligence.

Unless the value of the goods is declared at the time of shipment hereunder and is stated herein, and extra freight as may be agreed upon is paid by the shipper, consignee and/or owner of the goods, the shipowner shall in no event be obligated to declare to the on-carrier any valuation of the goods, even though the on-carrier's bill of lading, receipt or shipping document contains a valuation or limitation of liability less than that contained in this bill of lading.

15.—ALSO, that in case the final port of destination is closed by ice or the last regular steamer of the season from port of transshipment is fully engaged, or already fully loaded, or in case the final port of destination is declared infected, the carriers are at liberty to forward the goods to any other port apparently nearest accessible to which a regular service is maintained, or to warehouse the goods at intermediate port or ports at the risk and expense of the owners of the goods and to forward the said goods to destination as soon as practicable. Full freight is due on goods thus forwarded and the terms of the through Bill of Lading are to be considered fulfilled in every respect. If owners of the goods desire transportation by rail it will be for their account. Should the owners of the goods desire to give special orders for the forwarding from port of transshipment, they must do so at latest on arrival of the goods there and carriers will comply with such orders as far as possible, but always at the risk and expense of the owners of the goods.

16.—ALSO, that all weights are subject to correction, and where goods are weighed or measured by the carrier to ascertain freight, the expenses for reweighing shall be paid by the consignee, any custom of the port to the contrary notwithstanding; the Consignees also to pay any excess of freight discovered, and the carrier to have a lien on the goods for such charges.

17.—ALSO, that no claim shall, under any circumstances whatsoever, attach to any steamer or her owners for failure to notify consignees or any other party of arrival of goods.

18.—ALSO, that single packages exceeding one ton in weight shall be liable to pay extra charges, if any, for loading, handling, transshipping or discharging. Also, that the steamer or any of the servants of the company shall not be liable for any damage or loss occurring from accident in loading, handling, discharging or transshipping of packages exceeding one ton in weight. And in case of any damage or loss resulting to steamer, cargo, lighters, cranes or hoisting tackle, owing to incorrect weight having been declared, the shippers and/or consignees of such cargo shall be responsible for such loss or damage.

19.—ALSO, that in case the entry of the port of discharge or communication therewith, rendering or being liable to render the vessel liable to quarantine at any subsequent port, or in case of the master considering the entry of any port either from epidemic or otherwise unsafe or injurious to the further prosecution of the steamer's intended voyage, the goods may be landed or put into lazaretto, bulk, or lighter, at any other available port the master may consider safe, at shipper's risk and expense, and thereupon the liability of the steamer or carrier hereunder shall absolutely cease. In the event of quarantine, the goods may be discharged on arrival into quarantine depot, bulk, lighter or other vessel necessary for the ship's dispatch, at the consignee's risk and expense, or the master may carry on the goods to the nearest convenient port and there land them; advices mailed to consignees, if named, or otherwise to shippers, shall be deemed under this agreement a due delivery of said goods, and such goods shall be liable and a lien held thereon for all quarantine expenses incurred in consequence.

20.—ALSO, that if on arrival of the steamer off the port of destination it is impossible or unsafe to enter and commence discharging immediately, on account of weather, strikes, lockouts, earthquake, epidemic, interdict, prohibition of importation, riot, war, decrees of port authorities, congestion of port with notorious consequent detention, or other disturbance, or for any other cause beyond the control of said steamer or steamers, the Master is entitled to proceed to any convenient neighboring port or ports and

there discharge the goods for transshipment to destination, or retain them on board for delivery upon return at the Master's option, but at the risk and expense of the owners of said goods. If landed at the next convenient port and advices hereof mailed to consignees, if named, or otherwise to shippers, a due delivery of said goods under this agreement shall be deemed to have been affected, and goods to be liable for all extra expenses incurred in consequence and subject to a lien for the same.

21.—ALSO, that if any bag or baled goods are landed slack or torn, the consignees shall accept such portion of the sweepings as shall be allotted by the steamer's agent, and the same shall be deemed a full settlement of any claim for losses in weight.

22.—ALSO, that for metal in slabs, bars, ingots, rods, hoops, plates, etc., or any other articles shipped loose or in bundles, steamer shall not be held responsible for the total number of pieces or for their respective marks and/or weight and/or measurement, or for breakage or loss of broken pieces.

23.—ALSO, that freight is to be paid on barrels whether full, part full or empty. Ship not responsible for leakage, breakage, nor rust.

24.—ALSO, that the steamer shall have liberty to carry cargo on deck, or livestock on deck and/or under deck.

25.—ALSO, that the ship shall not be liable for number of pieces of lumber when shipments of this article consist of thin or short pieces; nor for number of small staves; nor for splits, shakes, broken bundles, marks, weight or measurement. When goods are shipped together with other lots, ship shall not be liable for expense of sorting marks. Receivers to pay the cost of assorting staves at destination.

26.—ALSO, that where grain is stowed together with other grain without separation, either from the same or another shipper, each Bill of Lading shall bear its proportion of loss and/or damage, if any.

27.—ALSO, that no legal proceedings may be brought against the Captain or Shipowners or their Agents in

respect to any loss of or damage to any goods herein specified except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, not withstanding that the ship may be legally represented there.

28.—ALSO, that this contract is governed by the law of the steamer carrying the goods, but any average that may arise on the voyage to be adjusted according to conditions named on the reverse side.

29.—ALSO, that in regard to all and everything which is not regulated and provided for in the present Contract of Transport, the regulation of the Italian Commercial Code will be in vigour.

30.—ALSO, notwithstanding anything to the contrary that may be printed in this bill of lading steamer is not obligated to give receivers overside delivery, except in specific instances where this privilege is granted by a stamped clause to that effect on this bill of lading.

31.—ALSO, if cotton be shipped hereunder, it is mutually understood and agreed that the description of the condition of the cotton does not relate to insufficiency of nor the torn condition of the covering, nor to any damage resulting therefrom, and that no carrier shall be responsible for any damage of such nature nor for any damage not caused by its negligence.

32.—This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods By Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

33.—Goods may be stowed in poop, forecastle, deck house, shelter deck, passenger spaces or any other covered in space commonly used in the trade and suitable for the carriage of goods, and when so stowed shall be deemed for all

purposes to be stowed under deck. In respect of goods carried on deck all risks of loss or damage by perils inherent in such carriage shall be borne by the shipper or the consignee but in all other respects the custody and carriage of such goods shall be governed by the terms of this bill of lading and the provisions stated in said Carriage of Goods by Sea Act notwithstanding Sec. 1 (e) thereof, or the corresponding provision of any Carriage of Goods by Sea Act that may be applicable. Specially heated or specially cooled stowage is not to be furnished unless contracted for at an increased freight rate. Goods or articles carried in any such compartment are at the sole risk of the owner thereof and subject to all the conditions, exceptions and limitations as to the Carrier's liability and other provisions of this bill of lading; and further the Carrier shall not be liable for any loss or damage occasioned by the temperature, risks or refrigeration, defects or insufficiency in or accidents to or explosion, breakage, derangement or failure of any refrigerator plant or part thereof, or by or in any material or the supply or use thereof used in the process of refrigeration, unless shown to have been caused by negligence of the Carrier from liability for which the Carrier is not by law entitled to exemption.

34.—If the liability for any collision in which the vessel is involved while performing this bill of lading fails to be determined in accordance with the laws of the United States of America, the following clause shall apply:—

If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss on liability to the other or non-carrying ship or her owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

The foregoing provisions shall also apply where the Owners, Operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect to a collision or contact.

35.—In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered. Suit shall not be deemed brought until jurisdiction shall have been obtained over the Carrier and/or the ship by service of process or by an agreement to appear.

36.—SPECIE: Specie will not be shipped or landed by the Carrier; it must be put on board by the shipper, and will only be delivered on board on presentation of the bills of lading properly endorsed; it may be carried on at consignee's risk if delivery is not taken during the ship's stay in port; and in every case the liability of the Carrier shall cease when the specie leaves the ship's deck.

37.—The contract or intended voyage, as herein described includes calls for any purpose whatsoever, whether in connection with the present, a prior, or succeeding voyage.

38.—The vessel in addition to all other liberties shall have liberty as part of the contract voyage and at any stage thereof to proceed to any port or ports whatsoever whether such ports are on or off the direct and/or customary route or routes to the ports of loading or discharge named in this Charter and there take oil bunkers in any quantity in the discretion of owners even to the full capacity of fuel tanks, deep tanks and any other compartment in which oil can be carried whether such amounts is or is not required for the chartered voyage.

39.—WAR RISK CLAUSE.—The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise howsoever given by the Government of the Nation under whose flag the vessel sails or any department thereof, or any person acting or purporting to act with the authority of such Government or of any depart-

ment thereof, or by any committee or person having, under the terms of the War Risks Insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfillment of the contract voyage and the freight shall be payable accordingly.

In the event of war, warlike disturbances or conditions, existing or threatened, vessel may abandon the voyage, put into or remain at any port, and discharge the cargo at any port, if in the judgment of the master or owner conditions render it advisable; and in connection herewith if cargo be discharged at any port after the voyage begins, same shall be deemed a complete delivery under the contract and full freight shall be considered earned.

"The goods covered by this bill of lading are accepted for shipment subject to the express condition that, should said goods be subjected at any time or place to inspection or control by any belligerent power, carrier will not be responsible for any damage or deterioration of whichever nature caused thereby or by any incidental delay, and said goods will only be delivered at destination provided, following any such inspection or control the said goods are left undisturbed in the vessel at the disposal of the carrier without restrictions, and always subject to the terms and conditions of this bill of lading."

ENDORSEMENT

[fol. 21]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF CARL G. STEARNS IN OPPOSITION TO MOTION TO DECLINE JURISDICTION—Filed: Sept. 21, 1956

State of Texas,
County of Harris, ss.:

Carl G. Stearns, being duly sworn, deposes and says:

I am a partner of Fulbright, Crooker, Freeman, Bates & Jaworski, proctors for the libelant in the above case,

and am in charge of the litigation for the libelant and familiar with the facts relating thereto.

Libelant, Carbon Black Export, Inc., is a citizen of the United States, being a corporation organized and existing under the laws of the State of Delaware, with its principal office at 420 Lexington Avenue, New York, N. Y.

Respondent, Navigazione Alta Italia, operating under the trade name of "Creole Line", is an Italian corporation and owner and operator of the S. S. MONROSA and numerous other steamships. It operates a fleet of cargo ships between Houston and other Gulf Ports on the one hand and Italian and other Mediterranean ports on the other hand. It has regularly scheduled service between such ports. Its ship MONGINEVRO sailed from Houston on or about September 6, 1956, and it has scheduled to sail from Houston the MONBALDO on September 30, the MONSTELLA on October 8, and the MONDORO on October 22, 1956. Lloyds [fol. 22] Shipping Index, photostatic copy of a sheet of which is attached hereto shows that the MONROSA arrived at Corpus Christi on September 10, and it is likely that she will load cargo at Houston and/or other Gulf ports. She was in Houston from April 7 to April 10, 1956, subsequent to the libel herein being filed on April 3, 1956. Respondent Navigazione Alta Italia maintains an office in the Cotton Exchange Building, Houston, where it carries on a regular steamship business. Its Houston agents are Texas Transport and Terminal Co., Inc., with offices in the Cotton Exchange Building, Houston. Its bills of lading are printed in English and show on their faces in large type that Texas Transport and Terminal Co., Inc., is its agent—a photostatic copy of one of its bills of lading involved in the above case is attached hereto and made a part hereof.

The above suit is one for cargo loss and damage. The libelant, on December 15, 1955, shipped 12,060 bags of carbon black on the MONROSA at Houston, and, on December 23, 1955, shipped 17,239 bags of carbon black on the MONROSA at New Orleans, all consigned to various ports in Italy. Subsequently, the MONROSA arrived at Genoa, Italy, and discharged the carbon black in a seriously damaged condition. Libelant sues for $110,000. damages for such loss and damage.

Libelant filed its libel on April 3, 1956, and service was had on the same day on the respondent by serving citation on Texas Transport and Terminal Co., Inc., as agent for said respondent. A *general appearance* was filed on behalf of said respondent by Messrs. Royston & Rayzor on April 9, 1956. A warrant of seizure was not issued for the MONROSA upon the agreement of Royston & Rayzor [fol. 23] to file release bond in the amount of $100,000. and also claim of owner for the MONROSA on behalf of respondent, Navigazione Alta Italia, her owner. Said notice of general appearance, release bond, and claim of owner are still on file in the office of the Clerk of this Court.

The respondent having voluntarily entered a *general* appearance, it has *waived* its right, if any, to contest the jurisdiction of this Court and to file a motion for this Court to decline jurisdiction—see authorities in supporting memorandum of authorities.

If this Court should decline jurisdiction and dismiss the libel, the release bond of $100,000. would be cancelled and the libelant left without security. If the bond should be cancelled, the libelant might not be able to again attach the MONROSA in Italy, and, if so, likely would not be able to obtain adequate security due to the applicable Italian laws, exchange difficulties, etc. The respondent has not shown how and in what amount the libelant could obtain security in Italy, if the libel herein is dismissed and the release bond cancelled. In fact, it has not made any showing of the efficacy of a resort to the Italian courts.

Clause 27 of the respondent's bill of lading, set forth in respondent's motion and memorandum, does not bar suit *in rem* against the MONROSA and her seizure, but it purports only to bar legal proceedings against the "Captain or ship owners or their agents". In this suit the MONROSA is proceeded against directly *in rem* and release bond and claim of owner has been filed on her behalf. Accordingly, if Clause 27 of the bills of lading, perchance should be held to be valid and bar suit *in personam* against the respondent, it [fol. 24] should not be held to bar the suit proceeding *in rem* against the MONROSA.

If libel herein is dismissed and the libelant forced to resort to the Italian courts, the *libelant* would have to put

up a substantial bond in the Italian courts, which it does not have to do herein. Also, the libelant might be held liable in the Italian courts for respondent's attorney fees, which it would not herein.

Clause 32 of the bills of lading provides that they "shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States". Accordingly, this Court should retain jurisdiction to interpret and apply the said law of the United States and not leave it to be interpreted and applied by the Italian courts.

There are the following additional reasons that this Court should retain jurisdiction:

1. There is no question that this Court has jurisdiction of the respondent *in personam* and the MONROSA *in rem*. The only question presented by respondent is whether or not this Court should decline to exercise the jurisdiction it unquestionably has.

2. The libelant is an American citizen and, accordingly, should be entitled to sue in the courts of the United States and not be forced to pursue doubtful litigation in the courts of Italy.

3. Where there is a choice of forums, the libelant has [fol. 25] the right of choice. Libelant chose to sue in this country in preference to Italy, as it was entitled to.

4. The shipments were made from the Port of Houston. Only here is testimony available that the carbon black was in good order and condition when shipped.

5. The manner of stowage of the carbon black at Houston and New Orleans will be an important issue. Testimony in this connection will have to be taken of stevedores and other persons at Houston and New Orleans.

6. One of the most important issues will be the question of seaworthiness of the MONROSA prior to and at the time of loading at Houston. During the voyage to Italy sea water entered through wasted plates and other defects in No. 5 hold. Testimony will have to be taken at Houston as to the condition of her No. 5 hold before carbon black was loaded therein.

7. Libelant had the MONROSA surveyed at Houston subsequent to the loss by J. R. Bencal, Houston Marine Surveyor. His testimony is most important to the libelant.

8. Libelant is willing and able to produce all of its witnesses at Houston on the trial or take their depositions before trial.

9. Respondent's principal testimony will come from members of the crew of the MONROSA. The MONROSA operates regularly in service between Gulf ports and Italian ports. Accordingly, depositions of members of the crew could be taken at Houston or other Gulf port in the United [fol. 26] States. Since the respondent has an average of two ships per month at the Port of Houston, it could easily designate the MONROSA as one of these ships. The MONROSA is reported to have arrived at Corpus Christi on September 10, 1956. She was in Houston for four days subsequent to the filing of the libel, i.e. from April 7 to April 10, 1956, at which time depositions of her crew could have been taken—in fact, libelant endeavored to take such depositions but the respondent obtained an order of this Court prohibiting same.

Libelant answers the reasons alleged by the respondent in its motion for this Court to decline jurisdiction as follows:

1. It admits that the MONROSA is owned by an Italian Corporation.

2. It denies all the respondent's witnesses are Italians with no expectation of being in the United States at the time of the trial. No doubt, Respondent would call as witnesses the stevedores at Houston and representatives of Texas Transport and Terminal Co., Inc., its agents at Houston, in an endeavor to prove proper stowage and seaworthiness of the MONROSA at the time of departure from Houston. Also, respondent would likely call as a witness Captain R. L. Wynne, Houston Marine Surveyor, who surveyed the MONROSA at Houston on respondent's behalf. No doubt, the members of the crew of the MONROSA who respondent would call as witnesses are still on board her

or on other vessels of the respondent, calling regularly at the Port of Houston and other Gulf ports—in such [fol. 27] event, their depositions could readily be taken at Houston or other Gulf port.

3. It admits that the cargo was discharged in Italy and there surveyed and segregated. It will take the deposition of its surveyor in Italy or produce him on the trial.

4. It admits that Clause 8 of the bills of lading provides that the value of the cargo shall be determined as of its market price at the port of destination. Market value will not be an issue on the trial, but only on a reference after trial if libelant is successful on the trial. In any event the burden of proof would be on libelant to prove market price. Respondent is not in position to complain about the availability of *libelant's* witnesses.

5. Libelant admits that the seaworthiness of the MONROSA before, at the beginning of, and during the course of the voyage will be one of the main issues on the trial, but denies that testimony in this connection will be more readily available to the Italian court than to this Court. The most important issue will be the seaworthiness of the MONROSA at the time of loading and beginning her voyage at Houston. As pointed out above testimony in this respect will be from local witnesses and the crew of the MONROSA, which crew likely will be available for taking their depositions at Houston or other Gulf port prior to the trial.

6. General Average is not involved in this suit.

[fol. 28] 7. If United States shippers elect to move their goods on foreign vessels, they should be bound only by provisions of the bills of lading which are *valid* under the laws of the *United States,* which Clause 27 of the MONROSA bills of lading is not, as it has the effect of ousting United States courts of jurisdiction. Also, there is no evidence that a more favorable rate or routing was obtained by shipping on

the MONROSA rather than by a ship of United States registry.

Wherefore, libelant prays that respondent's motion to decline jurisdiction of this Court be denied.

(Signed) Carl G. Stearns

Sworn to before me this 21 day of September, 1956.

(Signed) Fleta B. Jones, Notary Public in and for Harris County, Texas.

* * * * * * *

Exhibit: Photostat of Bill of Lading Covering 1980 Bags of Carbon Black omitted from the printed record pursuant to the Joint Request for Printing Record.

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Exhibit: Photostat of Lloyd's Shipping Index omitted from the printed record pursuant to the Joint Request for Printing Record.

[fol. 29]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF E. D. VICKERY IN SUPPORT OF MOTION TO DECLINE JURISDICTION—Filed: October 2, 1956

The State of Texas,
County of Harris, ss.:

E. D. Vickery, being duly sworn, deposes and says:

I am a partner of Royston & Rayzor, Proctors for the Respondents in the above case and am in charge of the litigation for the Respondents and familiar with the facts relating thereto.

All of the factual allegations sworn to in Respondents' Motion to Decline Jurisdiction are reaffirmed as true and correct.

The additional factual allegations in the Memorandum In Support of Respondents' Motion to Decline Jurisdiction are likewise true and correct, and appear in the Memorandum as follows:

1. There were a total of 27 Ocean Bills of Lading issued at the ports of Houston and New Orleans covering the cargo of carbon black loaded aboard the Respondents' vessel SS MONROSA in December, 1955.

2. Since the voyage referred to in the Libel, the [fol. 30] Captain of the SS MONROSA has suffered a heart attack and is no longer aboard the vessel.

3. The port of Genoa, Italy was the first port reached by the SS MONROSA when it departed New Orleans bound for Italy and it was there that all of the cargo which was capable of being delivered was discharged and the remainder damaged to such an extent that it could not be delivered to the other Italian ports. Therefore it was at Genoa where the cargo was discharged and surveyed, the damages segregated and the condition of the cargo noted, not only by Respondents' representatives but by Libellant's representatives as well.

4. The Italian Courts are familiar with the United States Carriage of Goods by Sea Act and, along with the United States, have adopted the Bruxelles Convention of 1924 (certain uniform rules relating to Bills of Lading). Italy has been a maritime nation for centuries and there is no serious suggestion that its courts are incompetent to apply the United States Carriage of Goods by Sea Act fairly and justly; all of the above more fully appearing on pps. 11 and 12 of Respondents' Memorandum in Support of its Motion to Decline Jurisdiction.

In addition, affiant knows the factors listed below in Respondents' Memorandum in reply to Libellant's Memorandum and Affidavit are true and correct:

1. That Lykes Bros. Steamship Co., Inc., among others, maintains regular services to these Italian [fol. 31] ports, Trieste, Genoa, Venice and Naples, with vessels sailing from the Gulf to such ports each two weeks.

2. Testimony respecting the seaworthiness of the hull of the SS MONROSA when it departed Houston

and New Orleans is primarily obtainable from Italian surveyors and the crew of the SS MONROSA, since no hull surveys of the SS MONROSA's cargo holds were made by American surveyors at Houston and New Orleans prior to the vessel's departure on the voyage in question.

Wherefore, Respondents pray that the Court grant its Motion to Decline Jurisdiction and dismiss the Libel.

(Signed) E. D. Vickery

Sworn and subscribed to before me, this 2nd day of October, 1956.

(Signed) Hildegarde E. Slaughter, Notary Public in and for Harris County, Texas.

Certificate of Service (omitted in printing).

[fol. 32]

IN UNITED STATES DISTRICT COURT

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI, (Carl G. Stearns), of Houston, Texas, Proctors for Libelant.

ROYSTON & RAYZOR, (E. D. Vickery), of Houston, Texas, Proctors for Respondent.

OPINION—Filed: December 31, 1956

Since the agreement (bills of lading) between Libelant and Respondents to sue or be sued only in the Courts of Genoa, Italy, and because it is not shown that said agreement is unreasonable, this Court will decline jurisdiction of this case; conditioned, however, that Respondents shall, within fifteen (15) days from date hereof, deliver to Libelant a good and sufficient bond, in the principal sum of one hundred thousand dollars ($100,000.00), guaranteeing the payment of any final judgment that may be had in favor of Libelant against Respondent's ship, The SS Monrosa, up to and including the sum of one hundred thousand dollars ($100,000.00) as a result of the cause of action made [fol. 33] the basis of this suit. See William H. Muller &

Co. vs. Swedish American Line, Ltd., et al, 224 F. 2d 806, 1955 A.M.C. 1687 (1955), cert. denied 350 U.S. 903, 76 S. Ct. 155, 100 L. Ed. 100, 1955 A.M.C. 2406 (1955).

Said one hundred thousand dollars ($100,000.00) bond to be kept in effect by Respondents until the termination of the controversy involved in this suit.

Clerk will notify counsel.

(s) Allen B. Hannay, United States District Judge.

IN UNITED STATES DISTRICT COURT

RESPONDENT'S BOND—Filed: January 24, 1957

Whereas a libel was filed in this cause on or about April 3, 1956, by Carbon Black Export, Inc., against the SS MONROSA, her engines, tackle, etc. and Navigazione Alta Italia, for the reasons and causes in said libel mentioned, and a claim has been filed by Navigazione Alta Italia, a corporation, to said vessel, and

Whereas, by memorandum dated December 31, 1956, this Court has declined jurisdiction of this case because it had [fol. 34] not been shown that the agreement between Libellant and Respondents to sue or be sued only in the Courts of Genoa, Italy, is unreasonable, conditioned, however, upon Respondents delivering to Libellant a good and sufficient bond in the principal sum of One Hundred Thousand ($100,000.00) Dollars, guaranteeing the payment of any final judgment that might be rendered in the Courts of Genoa, Italy, in favor of Libellant and/or its successors in name and interest against the Respondent-Claimant's ship, the SS MONROSA, as a result of the alleged cause of action made the basis of this cause, with said bond to be kept in effect by Respondent-Claimant until the termination of the controversy involved in this cause, and

Whereas, the said Respondent-Claimant, Navigazione Alta Italia, and National Surety Corporation its surety, the parties hereto hereby consent and agree, that in case of default or contumacy on the part of said Respondent-Claimant or its surety, execution may issue against their

goods, chattels and lands for the sum of One Hundred Thousand ($100,000.00) Dollars.

Now, Therefore, It Is Hereby Stipulated and Agreed, for the benefit of the Libellant, Carbon Black Export, Inc., and/or its successors in name and interest, that the stipulators undersigned are, and each of them is, bound in the sum of One Hundred Thousand ($100,000.00) Dollars, conditioned that the Respondent-Claimant above named shall abide by and pay the money awarded, if any, including costs of court, by any final judgment that may be rendered in the Courts of Genoa, Italy, in favor of the Libellant above named and/or its successors in name and interest against [fol. 35] the Respondent-Claimant's ship, the SS MONROSA, as a result of the alleged cause of action made the basis of this cause.

Executed in Triplicate Originals, this 23rd day of January, 1957.

Navigazione Alta Italia, (Signed) By E. D. Vickery, Principal, Of Royston & Rayzor, Its Proctors.

National Surety Corporation, (Signed) By Rube Armstrong, Jr., Surety.

(Seal)

Taken and acknowledged as to the Respondent-Claimant this 23rd day of January, 1957.

(Signed) Mrs. Louise Hill, Notary Public in and for Harris County, Texas.

(Seal)

Taken and acknowledged as to the surety this 23 day of January, 1957.

(Signed) Mrs. Louise Hill, Notary Public in and for Harris County, Texas.

(Seal)

[fol. 36] Approved:

Hill, Rivkins, Middleton, Louis & Warburton; Fulbright, Crooker, Freeman, Bates & Jaworski, (Signed) By Carl G. Stearns, Proctors for Libellant.

In United States District Court

Final Decree—January 25, 1957

On the 31st day of December, 1956, came on to be heard the Motion to Decline Jurisdiction of the Respondents herein and the Court having considered said Motion, the affidavits and briefs of proctors for Libellant and Respondents and the Court being of the opinion that it has not been shown that the agreement in the bills of lading between Libellant and Respondents to sue or be sued only in the Courts of Genoa, Italy, is unreasonable, and that it should decline jurisdiction of this cause, conditioned, however, upon Respondent-Claimant delivering to Libellant, within 15 days, good and sufficient bond in the principal sum of $100,000.00, guaranteeing the payment of any final judgment that might be rendered in the Courts of Genoa, Italy, in favor of Libellant and/or its successors in name and interest, against the Respondent-Claimant's ship, the SS MONROSA, as a result of the alleged cause of action made the basis of this cause, with said bond to be kept in effect by Respondent-[fol. 37] Claimant until the termination of the controversy involved in this cause, and it further appearing to the Court that the bond above required has been delivered by Respondent-Claimant to Libellant, now, therefore, it is

Ordered that the Court's Memorandum dated December 31, 1956, heretofore filed by the Court, be, and it hereby is, confirmed and adopted as the Court's Findings of Facts and Conclusions of Law pursuant to Supreme Court Admiralty Rule 46½, and it is further

Ordered, Adjudged and Decreed, that the Motion to Decline Jurisdiction of the Respondents be, and the same hereby is in all respects sustained, and that this cause be and it hereby is, dismissed without prejudice to the right of Libellant and/or its successors in name and interest to assert said cause in the Courts of Genoa, Italy, and it is further

Ordered, Adjudged and Decreed, that all costs of court be borne by Libellant, and it is further

Ordered that the Stipulation to Abide Decree filed herein by the Respondent-Claimant on or about April 9, 1956, be, and it hereby is, cancelled and discharged of record.

Done at Houston, Texas, this 25th day of January, 1957.

(Signed) Allan B. Hannay, United States District Judge.

[fol. 38] Approved as to Form:

Hill, Rivkins, Middleton, Louis & Warburton; Fulbright, Crooker, Freeman, Bates & Jaworski, (Signed) By Carl G. Stearns, Proctors for Libellant.

Royston & Rayzor, (Signed) By E. D. Vickery, Proctors for Respondents.

IN UNITED STATES DISTRICT COURT

LIBELANT'S PETITION FOR APPEAL—Filed: March 26, 1957

The libelant, Carbon Black Export, Inc., believes that the opinion of the District Court, the Findings of Fact, Conclusions of Law, and Final Decree heretofore entered thereon in the above case are erroneous.

Therefore, libelant prays that it may be allowed to appeal from said final decree to the next term of the United States Court of Appeals for the Fifth Circuit.

Dated at Houston, Texas, this 15th day of March, 1957.

[fol. 39] Fulbright, Crooker, Freeman, Bates & Jaworski, (Signed) By: Carl G. Stearns, Proctors for Libelant, Carbon Black Export, Inc., Bank of the Southwest Building, Houston 2, Texas.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—March 26, 1957

It is Ordered that the appeal herein be allowed as prayed for.

Dated this 26th day of March, 1957.

(s) Allen B. Hannay, United States District Judge.

Waiver

Services accepted, receipt of copy acknowledged and further services waived.

Royston & Rayzor, (Signed) By E. D. Vickery, Proctors for Claimant-Respondent, Navigazione Alta Italia.

[fol. 40]

IN UNITED STATES DISTRICT COURT

LIBELANT'S NOTICE OF APPEAL—Filed: March 26, 1957

Sirs:

Please take notice that Carbon Black Export, Inc., the libelant herein, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final decree of this Court entered herein the 25th day of January, 1957, and from each and every part of said decree.

Dated at Houston, Texas, this 15th day of March, 1957.

Fulbright, Crooker, Freeman, Bates & Jaworski, (Signed) By: Carl G. Stearns, Proctors for Libelant, Carbon Black Export, Inc., Bank of the Southwest Building, Houston, Texas.

To: Hon. V. Bailey Thomas, Clerk, Messrs. Royston & Rayzor, 877 San Jacinto Building, Houston, Texas.

[fol. 41] Waiver

Services accepted, receipt of copy acknowledged, and further services waived.

Royston & Rayzor, (Signed) By E. D. Vickery, Proctors for Claimant-Respondent, Navigazione Alta Italia.

* * * * * * *

Bond for Costs on Appeal ommitted from the printed record pursuant to the Joint Request for Printing of Record.

In United States District Court

Assignment of Errors—Filed: March 26, 1957

Carbon Black Export, Inc., hereby assigns error in the proceedings, decision, order, and final decree of the District Court in the above entitled suit, as follows:

1. In finding that the agreement (bills of lading) between libelant and respondents to sue or to be sued only in the courts of Genoa, Italy, was not unreasonable;

2. In holding that the District Court would decline juris-[fol. 42] diction of the above entitled suit on the ground that it had not been shown that the agreement (bills of lading) between libelant and respondents to sue or be sued only in the courts of Genoa, Italy, was not unreasonable;

3. In declining to take jurisdiction in the above entitled suit.

4. In sustaining respondents' motion to decline jurisdiction.

5. In entering a final decree sustaining respondents' motion to decline jurisdiction.

6. In entering a final decree declining jurisdiction.

7. In entering a final decree dismissing the above entitled and numbered cause.

8. In entering the final decree which is entered in the above entitled and numbered cause.

9. In entering a final decree ordering, adjudging and decreeing that all costs of court be borne by the libelant.

10. In ordering that the Stipulation to Abide Decree filed by the respondent-claimant on or about April 9, 1956, be cancelled and discharged of record.

Fulbright, Crooker, Freeman, Bates & Jaworski, [fol. 43] (Signed) By: Carl G. Stearns, Proctors for Carbon Black Export, Inc., Bank of the Southwest Building, Houston 2, Texas.

Waiver

Services accepted, receipt of copy acknowledged and further service waived.

Royston & Rayzor, (Signed) By: E. D. Vickery, Proctors for Claimant-Respondent, Navigazione Alta Italia, 877 San Jacinto Building, Houston 2, Texas.

[fol. 44] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 45] [File endorsement omitted]

[fol. 47]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOLDING SESSIONS AT HOUSTON

No. 1417 Admiralty

CARBON BLACK EXPORT, INC.

versus

S/S "MONROSA", Her Engines, Tackle, Etc., and NAVIGAZIONE ALTA ITALIA

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[fol. 48]

MOTION TO PREPARE SUPPLEMENTAL RECORD AND ORDER GRANTING SAME—Filed: August 29, 1957

Now comes Carbon Black Export, Inc., libelant-appellant, in the above entitled and numbered suit and moves this Court to prepare a supplemental record on appeal and transmit the same to the United States Court of Appeals, Fifth Circuit, which shall include the following:

1. Notice of Appearance of Navigazione Alta Italia filed April 9, 1956;
2. Claim of Owner filed by Navigazione Alta Italia on April 9, 1956;
3. This Motion and Order;
4. District Clerk's Certificate.

Dated at Houston, Texas, August 26, 1957.

Fulbright, Crooker, Freeman, Bates & Jaworski, (Signed) By Carl G. Stearns, Proctors for Libelant-Appellant, Carbon Black Export, Inc.

[fol. 49] So Ordered at Houston, Texas, August 28, 1957.

/s/ T. M. Kennerly, United States District Judge.

We consent to the entry of the above Order without further notice.

Royston & Rayzor, (Signed) By E. D. Vickery, Proctors for Claimant-Respondent-Appellee, Navigazione Alta Italia.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEARANCE—Filed: April 9, 1956

Please take notice that the Respondent, Navigazione Alta Italia, hereby appears in the above entitled cause and that we are retained as proctors for the Respondent herein.

Royston & Rayzor, (Signed) By E. D. Vickery, 877 San Jacinto Building, Houston 2, Texas, Proctors for Respondent.

[fol. 50]

IN UNITED STATES DISTRICT COURT

CLAIM OF ORDER—Filed: April 9, 1956

And now appears Navigazione Alta Italia, for the interest of itself as owner of the SS MONROSA, her engines, etc., before this Honorable Court, and makes claim to the said SS MONROSA as the same is proceeded against at the instance of Carbon Black Export, Inc., and the said claimant, Navigazione Alta Italia, avers that it was at the time of the filing of the libel herein, and still is, the true and bona fide owner of the said SS MONROSA, her engines, etc.; wherefore, it prays to defend accordingly.

Navigazione Alta Italia, (Signed) By E. D. Vickery, Of Royston & Rayzor, 877 San Jacinto Building, Houston 2, Texas, Proctors for Claimant.

Duly sworn to by E. D. Vickery jurat omitted in printing.

[fol. 52] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 53]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—December 2, 1957 (omitted in printing)

[fol. 54]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16667

CARBON BLACK EXPORT, INC., Appellant,

versus

SS MONROSA, Her Engines, Tackle, Etc., and NAVIGAZIONE ALTA ITALIA, Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before BORAH, TUTTLE and CAMERON, Circuit Judges.

CAMERON, Circuit Judge: This appeal presents the question whether the court below correctly declined jurisdiction (on the ground that the bills of lading vested exclusive jurisdiction in Italian Courts) of a libel for damages to and nondelivery of cargo, brought by an American citizen against the ship upon which the cargo was loaded and [fol. 55] against the owner of the ship. In December, 1955, the libelant, Carbon Black Export, Inc., a manufacturer an (sic) exporter of carbon black, delivered to, and shipped on board, the SS MONROSA at Houston Texas and New Orleans, Louisiana about 30,000 bags of carbon black. The shipments to three Italian ports were covered by twenty-seven bills of lading, all on the same printed form.

Upon arrival of the MONROSA at the first Italian port, a portion of the shipment was delivered in damaged condition, and that destined for the other two Italian ports was never delivered at all. Libelant claimed damages in the sum of $110,000.00.

The libel was filed in the court below upon the return, some three months later, of the MONROSA to Houston, Texas and prayed that process issue against the MONROSA, her engines, tackle, etc., and that all persons claiming any right, title or interest in the steamship be cited to appear and that the steamship be condemned and sold to pay libelant's demands. Besides the *in rem* action against the MONROSA, Navigazione Alta Italia, the owner of the vessel, was made a respondent.

Six days after the filing of the libel respondent Navigazione filed a "Stipulation to Abide Decree," reciting that the *in rem* proceeding had been brought against the SS MONROSA and that Navigazione had filed a claim[1] to the

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[1] The verified claim, filed on the same date, is in these words:

"CLAIM OF ORDER

"And now appears NAVIGAZIONE ALTA ITALIA, for the interest of itself as owner of the SS MONROSA, her engines, etc., before this Honorable Court, and makes claim to the said SS MONROSA as the same is proceeded against at the instance of CARBON BLACK EXPORT, INC., and the said claimant, NAVIGAZIONE ALTA ITALIA, avers that it was at the time of the filing of the

[fol. 56] vessel, and including this language: ". . . the parties hereto hereby consenting and agreeing, that in case of default or contumacy on the part of said claimant or its surety, execution may issue against their goods, chattels and land for the sum of $100,000.00." This stipulation, on which National Surety Corporation was surety, was conditioned "that the claimant above named shall abide by and pay the money awarded, including costs of court, by the final decree rendered in the cause by this court, or in case of an appeal by the appellate court."

About three months thereafter respondent Navigazione filed a motion praying that the court below decline jurisdiction of the cause based upon the terms of the bills of lading, chiefly the following provision:

> "Clause 27—Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there."

The motion set up grounds which respondents contended established the reasonableness of this provision. Affidavits were thereupon filed by one of the proctors for libelant [fol. 57] opposing the motion, and one of the proctors for respondents favoring it. The facts upon which the court below acted were set forth in the motion and the two affidavits.

The District Court filed a memorandum opinion[2] and entered a final decree reciting that it was "of the opinion

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libel herein, and still is, the true and bona fide owner of the said SS MONROSA, her engines, etc.; wherefore, it prays to defend accordingly."

[2] "Since the agreement (bills of lading) between Libelant and Respondents to sue or be sued only in the Courts of Genoa, Italy, and because it is not shown that said agreement is unreasonable, this Court will decline jurisdiction of this case; conditioned, however, that Respondents shall, within fifteen (15) days from date

that it has not been shown that the agreement in the bills of lading between Libellant and Respondents to sue or be sued only in the Courts of Genoa, Italy, is unreasonable," and granting the motion of respondents to decline jurisdiction and canceling and discharging the stipulation to abide decree filed by the respondent-claimant. Libelant appeals, setting forth its grounds in detail;[3] and respon- [fol. 58] dents point to the motion to decline jurisdiction filed by Navigazione, and the affidavit of its proctor filed as representative of the "Respondents" as spelling out their contentions that the action of the court below was correct.[4]

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hereof, deliver to Libelant a good and sufficient bond, in the principal sum of one hundred thousand dollars ($100,000.00) guaranteeing the payment of any final judgment that may be had in favor of Libelant against Respondent's ship, The SS Monrosa, . . . See William H. Muller & Co. vs. Swedish American Lines, Ltd., et al., 224 F.2d 806, 1955, . . . Cert. den. 350 U.S. 903 . . ."

[3] That it was a citizen of the United States; that respondent Navigazione operated a fleet of cargo ships between Houston and other Gulf ports and Italian and other Mediterranean ports and maintained regularly scheduled service between them; that the MONROSA was in port at Houston from April 7th to April 10th, 1956; that the bills of lading were printed in English; that a general appearance had been entered on behalf of respondents constituting a waiver of the claim against the court's jurisdiction; that Clause 27 of the bill of lading did not bar suit *in rem* against the MONROSA; that the bills of lading provided that the Carriage of Goods by Sea Act of the United States would form a part of the bills of lading and the United States Courts were in the best position to apply them; that libelant had the choice of forum and its choice should be respected; that the bills of lading were issued in the United States and partly performed here; that testimony of the condition of the carbon black when loaded and of the MONROSA at the time of loading was available only in the United States; and that it had endeavored to take the depositions of the MONROSA's crew while it was docked at Houston, but that such effort had been arrested by the court below at the instance of respondents; and that under the circumstances Clause 27 was illegal and that it had no application under the facts set forth.

[4] That the bills of lading provided that they were governed by the law of the steamer and the regulations of the Italian Commercial Code; that the vessel was owned by a Genoese corporation and its witnesses were Italians residing in Italy with no expectation of being in the United States at the time of trial; that the damage

We agree with libelant that the court below was in error in granting the motion to deny jurisdiction under the facts of this case. Particularly is this true with respect to the proceeding *in rem* against the ship itself. As to this feature of the case, the decision of the Second Circuit in *Muller*[5] [fol. 59] has no application. The ship there involved had been lost at sea and there was no *in rem* action. The clause of the bill of lading there involved[6] is broader than that in the case before us. The language there encompassed "any claim against the carrier arising under the bill of lading," while the language of the exclusionary clause here was confined to legal proceedings brought against the Captain or ship owners or their agents. There is nothing in Clause 27 which has any tendency to establish that the parties intended that it should be made applicable to an *in rem* proceeding against the ship itself.

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to the cargo was surveyed upon arrival at Genoa and the witnesses with respect to such damage were located there; that the market value of the cargo should be determined as of the market price at the port of destination; that the seaworthiness of the vessel before and during the voyage could be proved only by Italian witnesses; that the captain of the MONROSA had suffered a heart attack and was no longer aboard the vessel; that all of the cargo was discharged at Genoa, the remainder being damaged to such an extent that it could not be delivered to the other Italian ports, and the witnesses having knowledge thereof were situated in Genoa; that Italy has been a maritime nation for centuries and its courts were familiar with the U. S. Carriage of Goods by Sea Act and were capable of giving effect to it; and that because of the provisions of the bill of lading and also under the doctrine of forum non conveniens, the court below correctly declined jurisdiction.

[5] 224 F.2d 806, cert. den. 350 U.S. 903. Neither did the other two cases from the same Circuit so heavily relied upon by appellees, the Bio Bio case, 227 F.2d 519, and the Geisha case, 187 F.2d 990, involve actions *in rem*. Appellees cite no authority wherein an exclusionary clause similar to that here involved has been held to apply to an action *in rem*.

[6] "Jurisdiction. Any claim against the carrier arising under this bill of lading shall be decided according to Swedish law, except as provided elsewhere herein, and in the Swedish courts, to the jurisdiction of which the carrier submits himself."

What we said recently in *Motor Distributors, Ltd. et al* v. *Olaf Pedersen's Rederi*[7] is persuasive here, although we were considering the general question of whether justice would be better subserved by retaining or declining jurisdiction rather than the terms of an exclusionary clause:

> "Moreover, something deeply significant in the whole field of maritime law is here at stake. With respect to ocean-going carriers it seems that one of the most universally recognized rules of law is that which gives the right to libelant, possessing a maritime lien against [fol. 60] a vessel, to proceed in rem in the jurisdiction where the vessel is found."

Finding no authorities to the contrary, and feeling that the exclusionary clause relied on by respondents does not in terms apply to *in rem* proceedings, we hold that the court below was in error when it granted the motion to decline jurisdiction of the *in rem* feature of the libel.[8]

We are of the opinion also that the court below should have denied the motion of respondent Navigazione to decline personal jurisdiction as to it. In essence, the motion was based upon Clause 27 as buttressed by the doctrine of forum non conveniens. Any consideration of such a question starts with the universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.[9]

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[7] 1957, 239 F.2d 463, 467.

[8] It is of no importance that respondent Navigazione posted a bond to release the MONROSA. With respect to that action appellees say in their brief: ". . . in order to preserve the security which appellant had acquired by its seizure of the vessel . . . , the court conditioned its order on delivery by appellees to appellant of a good and sufficient bond . . ."

[9] The rule is thus epitomized in the headnote of the article on Contracts, 17 C.J.S. §229, page 603: "Contract provisions intended to oust courts of their jurisdiction in advance, as distinguished from provisions merely imposing conditions on the exercise of the right to sue, are void. This rule has been frequently considered in determining the validity of contracts as to venue, periods of limitation, notice or demand, and evidence." *(Continued)*

[fol. 61] We do not find it necessary to espouse or reject the position taken by the Court of Appeals of the Second Circuit in the cases mentioned above, which are relied upon as marking a departure from this general rule.[10] The facts before that Court in those cases were, in each instance, materially different from those before us. In addition to those already discussed, it is important to note that the contracts of carriage here were made in the United States and were partially performed here, that the bills of lading specifically adopted the Carriage of Goods by Sea Act of the United States as part of their provisions and were printed in English, tending to indicate that the parties recognized that the courts of the United States were in a good position to pass upon the rights of the parties to them. It is further noteworthy that the testimony of the crew of the MONROSA was sought by libelant and resisted by respondent when the crew were in Houston; and, finally respondents invoked the jursdiction of the court below in general terms and rested upon this action several months before challenging that jurisdiction by its motion.

[fol. 62] As heretofore pointed out, respondents pitch their argument to a considerable extent upon the doctrine

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And see also 14 Am. Jur., Courts, §196, pp. 389-390, which thus summarizes the rule: "Both in England and the United States it has been decided in a great number of cases, and conceded in an equally large number of other cases, to be settled law that the jurisdiction of the courts cannot be ousted by the private agreement of individuals made in advance, that private persons are incompetent to make any such binding contracts, and that all such contracts are illegal and void as against public policy."

Cited to both texts are a number of decisions of the Supreme Court of the United States; and cf. our decision in Burt v. Isthmus Development Co., 1955, 218 F.2d 353, 356, cert. den. 349 U.S. 922.

[10] Those cases do not purport to construe such a provision as Clause 27 as creating an absolute right but one to be accorded if all of the facts of a given case make it reasonable to give it effect. Several District Courts have considered the cases and have refused to decline jurisdiction despite the presence of similar clauses, e.g., Chemical Carriers, Inc. v. L. Smit & Company's etc., S.D. N.Y., 1957, 1954 F. Supp. 886; Sociedade Brasileira etc. v. S. S. Punta Del Este, etc., D. of N.J., 1955, 135 F. Supp. 394; and St. Paul Fire & Marine Ins. Co. v. The Republica de Venezeula et al., S.D. N.Y., 1952, 105 F. Supp. 272.

of forum non conveniens, recognizing that Clause 27 alone did not provide a firm basis upon which to stand. The rule governing application of that doctrine is thus expressed by the Supreme Court in *Gulf Oil Corp.* v. *Gilbert*, 1946, 330 U.S. 501, 508, "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

The judgment of the court below granting the motion to decline jurisdiction and vacating and discharging the stipulation to abide the decree of the court below is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

[fol. 63]

IN UNITED STATES COURT OF APPEALS

CARBON BLACK EXPORT, INC.,

No. 16667. versus

SS MONROSA, Her Engines, Tackle, Etc., and NAVIGAZIONE ALTA ITALIA.

JUDGMENT—April 18, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court granting the motion to decline jurisdiction and vacating and discharging the stipulation to abide the decree of said court, in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered, adjudged and decreed that the appellees, SS Monrosa, Her Engines, Tackle, Etc., and

Navigazione Alta Italia, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

[fol. 64] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 65]

SUPREME COURT OF THE UNITED STATES

No. 178, October Term, 1958

"SS MONROSA", her Engines, Tackle, etc., and NAVIGAZIONE ALTA ITALIA, Petitioners,

vs.

CARBON BLACK EXPORT, INC.

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.